

**NPM No. 11-2010**

22 April 2010

**MR. ENRIQUE C. DOMINGO**

*Officer-In-Charge*

*Procurement Office*

**BANGKO SENTRAL NG PILIPINAS**

A.Mabini St., Malate 1004 Manila

Dear **Mr. Domingo**:

We respond to your letter dated 30 September 2009 requesting for clarification on certain provisions of the revised Implementing Rules and Regulations (IRR) of Republic Act 9184 (R.A. 9184). Specifically, you raised the following queries<sup>1</sup>:

1. *Is the prohibition stated in Section 11.2.5 of the IRR that “[i]n no case shall the approving authority be the Chairman or member of the BAC” applicable to all kinds of approving authorities (e.g., approval of purchase requisitions, approval of award, signing of contract, approval for payment of expenditures)? Is it limited to approving authority for contracts? Or does it include approving authorities who possess delegated authorities to approve payments?*

It bears stressing that the prohibition stated in Section 11.2.5 is intended to avoid any conflict of interest between the person who undertakes procurement and the one approving said transactions. Consequently, it does not apply to approving authorities where this conflict of interest is not present. Further, under the Generic Procurement Manual – Systems and Organizations (Volume 1), it is clearly stated that the approving authority contemplated under Section 11 of R.A. 9184 and its IRR refers to the official who approves procurement transactions, who is the Head of the Procuring Entity (HOPE) or the person delegated by the HOPE to perform said function in his or her behalf.

2. *Whether posting of bidding documents in the Bangko Sentral ng Pilipinas (BSP) and Philippine Government Electronic Procurement System (PhilG-EPS) website is mandatory. Would PhilG-EPS be able to accommodate the large and voluminous files to be uploaded by BSP?*

<sup>1</sup> These are enumerated in an attachment to the letter entitled *Queries/Concerns Regarding the Revised Implementing Rules and Regulations (IRR) of Republic Act No. 9184*.

Pursuant to Section 17.5 of the IRR, it is mandatory for BSP to post its bidding documents on both its website and the PhilG-EPS, unless otherwise stated in the rules. PhilG-EPS has been developed to accommodate all bidding documents required to be posted on it. If you encounter any difficulty, however, you may immediately seek assistance from the PhilG-EPS System Administrator at telephone number 9005231 to 38.

3. *Please clarify what is a "bank draft/guarantee confirmed by a Universal Bank or Commercial Bank"? Is there a sample form to be issued by the GPPB? Is the local Universal Bank or Commercial Bank both the issuing and confirming bank?*

Please note that bank-issued instruments, as acceptable forms of bid or performance securities, are required to be confirmed only if these are issued by a foreign bank. The intent is to have a local Universal or Commercial Bank guarantee the obligations of a foreign issuing bank. (Please see *Feati Bank & Trust Co. v. C.A.* 196 SCRA 576 with regard to the commitments made by a bank once it confirms a bank instrument.) Consequently, a local Universal or Commercial Bank cannot be both the issuing and confirming bank.

4. *Whether letters of credit issued by foreign banks and received by BSP through the Society for the Worldwide Interbank Financial Telecommunication (SWIFT) still need to be confirmed by a local universal or commercial bank?*

To enable us to properly respond to your question, may we request for additional clarification on the purpose of having a bank instrument pass through SWIFT. Does passing through SWIFT constitute an implied guarantee on the obligations of the foreign issuing bank?

5. *How will the amount of bid/performance security be computed if a combination of the various forms of bid security is used? Can you please provide us with sample computations?*

If a bidder opts to use at least one or a combination of the acceptable forms of bid/performance security, then the amount of each form should be proportionate to the share of said form with respect to total amount of security. For instance, if the Approved Budget for the Contract (ABC) is P1 million, and bidder intends to secure its bid 60% by cash and the remaining 40% by surety bond, then the amount of each form of bid security should be as follows:

$$\begin{aligned} \text{Amount of Cash} &= (\text{ABC} \times 2\%) \times 60\% \\ &= (1,000,000 \times .02) \times .6 \\ &= 20,000 \times .6 \\ &= \text{P}12,000 \end{aligned}$$

$$\begin{aligned} \text{Amount of Surety Bond} &= (\text{ABC} \times 5\%) \times 40\% \\ &= (1,000,000 \times .5\%) \times .4 \\ &= 50,000 \times .4 \\ &= 20,000 \end{aligned}$$

6. *Whether the procuring entity should immediately return the second bid envelope unopened to the bidder if its bid has been declared failed for neglecting to submit all required documents in its first bid envelope?*

The bids and awards committee (BAC) should return the bid envelopes of a bidder whose bid has been finally declared failed despite the deletion of the sentence “[i]n case one or more of the above required documents in the first envelope of a particular bid is missing . . . , the BAC shall rate the bid concerned as “failed” and immediately return to the bidder concerned its second bid envelope unopened” in Section 30.1 of the IRR.

As a matter of prudence, however, it is recommended that the BAC retain the bid documents of a failed bid in the event that said decision is being contested by the bidder. In this manner, the integrity of the bid is protected in case the BAC reverses itself (or the HOPE rules in favor of the bidder, in case a protest is filed) and the procuring entity is duty bound to open the second bid envelope.

7. *Where can the list of pre-selected suppliers and consultants submitted to the Government Procurement Policy Board (GPPB) referred to in Section 49 of RA 9184 and its IRR be found. In the absence of said list, may the procuring entity resort to Limited Source Bidding on the basis of its own list of previous suppliers with experience or capability?*

As of date, the GPPB has not received any list of pre-selected suppliers or consultants under Section 49 of RA 9184 and its IRR. If the BSP has its own list of pre-selected suppliers, we recommend that said list be submitted to the GPPB in compliance with Section 49. Upon receipt of said list, the GPPB may inquire on the process by which the BSP pre-selected its suppliers, and if satisfied that said process does not violate the governing principles of RA 9184, post said list in its website in compliance with Section 49.

8. *Is the posting of performance and warranty securities required in all alternative modes of procurement? May the procuring entity still require the posting of performance and warranty securities in instances these are not required under the IRR?*

Section 54.5 of the IRR prescribes that, as a general rule, performance and warranty securities are still required except for Section 52 (Shopping), 53.2 (Emergency Cases), 53.9 (Small-value Procurement), 53.10 (Lease of Real Property) and 53.13 (UN Agencies).

In the aforesaid instances when the posting of securities is not mandatory, the procuring entity may still require the posting of said securities. It bears stressing that the IRR prescribes the minimum requirements. Procuring entities may require additional terms and conditions than those prescribed by the IRR as long as these are reasonable and redounds to the benefit of the government.

9. *Whether warranty is required for the procurement of expendable and non-expendable supplies through Shopping.*

As mentioned in the preceding paragraph, posting of warranty security is not mandatory for goods procured through the alternative mode of shopping.

10. *Whether reference to "late bids" under Section 69(j) only apply to those submitted during bid opening or can it also pertain to additional requirements that are required such as samples, prototype, etc. required to be submitted during post-qualification.*

Section 69(j) of the IRR enumerates certain acts that tend to defeat the purpose of competitive bidding, such as habitually submitting late bids, when administrative penalties may be imposed. It is our considered opinion that late "bids" may apply to other requirements, which if habitually submitted late, reflects an intent to defeat the purpose of competitive bidding.

11. *Section 77.2 of the IRR states that in cases when invitations were issued prior to its effectivity, procuring entities may continue adopting the provisions of IRR-A. Does this mean that procuring entities have the option to choose between the revised IRR and the IRR in cases when the invitation was published before the effectivity of the IRR?*

To avoid confusion, we believe that procuring entities must adopt the provisions of IRR-A and other applicable laws in the event that the invitation was published before the effectivity of the revised IRR.

We hope to have provided sufficient guidance on this matter. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,

  
**RUBY U. ALVAREZ**  
*Executive Director III*